

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 24 February 2004

BALCA Case No.: 2002-INA-269
ETA Case No.: P2001-NY-02472849

In the Matter of:

USHA MEHTA,
Employer,

on behalf of

USHA RANI DEV,
Alien.

Appearance: Earl S. David, Esquire
New York, New York
For Employer and the Alien

Certifying Officer: Dolores DeHaan
New York, New York

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification on behalf of Una Rani Dev ("the Alien") filed by Usha Mehta ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26. The following decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 13, 1998, Employer, Usha Mehta, filed an application for labor certification on behalf of the Alien, Usha Rani Dev, for the position of “Cook/Chef India Specialty,” which was classified by the Job Service as “Cook (Household) Live-out.” The job duties for the position were preparing and cooking Indian food, such as chicken mulabur, pakoras, tikka and jeera aloo. (AF 11). The only stated job requirement for the position was two years experience in the job offered. (AF 12).

In a Notice of Findings (“NOF”) issued on March 30, 2002, the CO proposed to deny certification based on the following: (1) Employer failed to establish that the job opportunity is a bona fide one, which is clearly open to U.S. workers and (2) Employer provided only one tearsheet documenting that the ad ran for only one day, not three tearsheets documenting that the ads were placed for three consecutive days. (AF 29-32).

Employer submitted its rebuttal on or about April 16, 2002. (AF 33-60). The CO found the rebuttal unpersuasive and issued a Final Determination (“FD”), dated May 14, 2002, denying certification on the same grounds. (AF 61-63). Under cover letter, dated June 12, 2002, Employer’s counsel filed a “Motion to reopen/reconsideration,” together with additional documentation, including the following: a physician’s letter regarding dietary specifications, a letter from a nutritionist, a letter from an accountant regarding Employer’s ability to pay the Alien’s salary, and an invitation list. (AF 64-82). On August 7, 2002, the CO denied Employer’s motion for reconsideration, stating that motions for reconsideration would only be entertained with respect to those issues which could not have been addressed in the rebuttal. (AF 83). Subsequently, the matter was docketed in this Office on August 26, 2002.

DISCUSSION

Twenty C.F.R. § 656.25(e) provides that an employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. Accordingly, the Board has repeatedly held that a CO's finding which is not addressed in the rebuttal is deemed admitted. *See, e.g., Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*); *Salvation Army*, 1990-INA-434 (Dec. 17, 1991); *Michael's Foods, Inc.*, 1990-INA-411 (Nov. 14, 1991).

In the NOF, the CO indicated that Employer was required to advertise for three consecutive days, yet submitted a tearsheet of the advertisement for only one day. The CO determined that this constituted a deficiency in recruitment. Employer was directed to rebut by submitting tearsheets for the three consecutive days or by documenting willingness to readvertise. (AF 29).

In rebuttal, Employer sought [unsuccessfully] to address the "bona fide job opening" issue, but made no effort to rebut the above-stated "recruitment/advertisement" deficiency. (AF 33-60). In the FD, the CO found that Employer had failed to address the deficiency in recruitment. (AF 61-62).

Upon review, we fully agree with the CO and find that Employer only documented that she advertised the position for one day; namely, June 24, 2001. (AF 19-20). Notwithstanding the CO's explicit instructions in the NOF, Employer's rebuttal failed to address this deficiency. (AF 33-60). Furthermore, even when Employer moved to reopen and/or reconsider this matter (after the Final Determination was issued), Employer still did not address this issue. (AF 64-82). Accordingly, we find that labor certification was properly denied.¹

¹ In view of the foregoing, we choose not to address the other cited deficiency; namely, that Employer failed to adequately document that a bona fide full-time job opening exists.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.